No. 86-684

In The

Supreme Court of the United States

October Term, 1987

CALIFORNIA,

Petitioner,

v.

BILLY GREENWOOD AND
DYANNE VAN HOUTEN,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 20, 1986

CERTIORARI GRANTED JUNE 26, 1987

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1987	
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IN THE MUNICIPAL COURT,
SOUTH ORANGE COUNTY JUDICIAL DISTRICT

Portion of Clerk's Transcripts of Motion to Quash Search Warrants and of Preliminary Hearing:

(BY MR. GAREY FOR GREENWOOD)

So I think the situation that is facing this Court is that the California Supreme Court has decided that by federal standard, by Fourth Amendment standard, a trash can search is illegal, there is no other controlling authority that I know of to which this Court can or should look.

Accordingly, this Court should conclude that the portions of the affidavit in support of the search warrant in this case, both of them, that are the product of trash can searches should be not considered in the sense of probable cause, the balance of the warrant—the affidavit is not sufficient to support the warrant and I think in that sense it would have to be quashed, both of them. (CT 17:4-16)

MR. GAREY: Proposition 8 can't affect the California Supreme Court's view of the Fourth Amendment because the Fourth Amendment carries with it an exclusionary rule which couldn't be touched by Proposition 8. The only question we're talking about is the interpretation of the Fourth Amendment. (CT 28:4-9)

MR. GAREY: But the California Supreme Court has said by federal standards that is illegal. There is no other court that has the power to change that other than the United States Supreme Court, or, as I said, if the Cali-

fornia Supreme Court wants to re-examine its own rule, that's fine.

The People's argument here is addressed very, very, much to the wrong court. This Court under the cases that I cited having to do with court procedure, in essence, and the Auto Equity Sales case, and the other cases that I cited to this Court, this Court really doesn't have the power to disagree with Krivda on the question of what does the Fourth Amendment mean and put in that context Proposition 8 becomes utterly irrelevant.

I'm not arguing Article 1 Section 13. I don't have to. (CT 28:19-29:7)

(BY THE COURT)

. . . the question is: How is the Court now to determine whether or not as a matter of federal law a trash can search is illegal? (CT 38:5-6)

THE COURT: If I had no case law to go on but only common sense it would be one of the easier decisions I have ever made in my life and that would be that there is no reasonable expectation of privacy when you put your trash out. I think it's hard for me to understand how anybody could rule otherwise, but other people have ruled otherwise including our Supreme Court in Krivda. (CT 38:17-23)

But I will consider anything, but if left to my own devices, I certainly would be embarrassed to have to argue in front of anybody but lawyers, you know, just the average person out there on the street who would rely on common sense, I would certainly be embarrassed to stand up and argue and say oh, yeah, you have a great

expectation of privacy, in your, you know, in your trash there dumped out, people are going through it all the time. You have got the trash pickers up at the dump and crash (sic) collectors are always looking for something good in there. Some lawyers with the thinking that we have developed I suppose you can argue anything and it won't sound ridiculous, but, boy to two million non-lawyers out there, you would get a great skit on Johnny Carson. (39:7-19)

MR. NOVEMBER: (for Van Houten) Your Honor, just to reaffirm what Mr. Garey said, it's not a trash matter that we're concerned about, it's really the law enforcement people. It's not your neighbor, if it was neighbors here or just a curious trash man, we wouldn't be here arguing this motion before this court. (41:22-42:1)

THE COURT: Nice try there. Okay. Well, I will deny the motion to quash. (43:21-22)

BY MR. GAREY: Q. Officer Stracner, on April the 6th when you contacted the trash collector, what did you do? Did you make some kind of a request to the trash collector?

A. Yes, I did.

Q. What request was that?

A. To pick up the trash at 1575 Fayette.

Q. And what did you ask him to do with the trash?

A. To deliver it to me.

Q. And did he do that?

A. Yes, he did.

Q. Did you thereafter go through the trash?

A. Yes, I did. (91:12-23)

Q. By the way, in order to get to 1575 Fayette Place by automobile, do you have to travel on a private road?

A. No.

Q. It's all what? City-owned or County-owned roads?

A. City.

Q. Did you see where the trash collector people picked up the trash cans?

A. Yes, I did.

Q. Where was that?

A. On the street.

Q. Directly in front of the 1575 address?

A. Yes. (100:5-17)

BY MR. NOVEMBER: Q. And the morning you contacted this man was he alone, or was there someone working with him?

A. He was alone.

Q. And you saw him pick up the trash and garbage from 1575 Fayette Place?

A. Yes.

Q. And then subsequent to him doing that the containers of trash and garbage were delivered to you?

A. Yes.

Q. And that had been pursuant to your request?

A. Yes.

Q. And when you received them from the garbage man, in what type of receptacles or containers was the trash?

A. Plastic garbage bags.

Q. Are they a dark color?

A. Most of them are dark, yes. (101:16-102:5)

BY MR. GAREY: Q. Mr. Rahaeuser, sometime during the month of May of 1984 did you participate in a surveillance of 1575 Fayette Place in Laguna Beach?

A. During what month, sir?

Q. May.

A. Yes, sir.

Q. And in that connection, sometime during the month of May did you contact the trash collector for that area?

A. Yes, sir; I did.

Q. On what date was that?

A. May I refer to my report, sir?

Q. Sure.

A. It was on May the 4th, sir.

Q. About what time of day or night was that?

A. It was between seven and nine o'clock, I believe, sir.

Q. In the morning?

A. Yes.

Q. What did you say to the trash collector?

A. I advised him who I was, and I told him that I was conducting an investigation; and I asked if he would assist me.

Q. And did you tell him what kind of assistance you wanted?

A. Yes, sir.

Q. What kind of assistance did you tell him that you wanted?

A. I told him there was some trash up the street that I was desirous to have and that there were certain procedures that would have to be followed in order for me to obtain the trash.

Q. What procedure did you tell him that would have to be followed?

A. I told him his collection bin would have to be free from any trash. He would then have to, after he left, to go directly to that house, pick up the refuse that was located in front of the house, put it in his bin and come back to my location.

Q. And to the best of your knowledge did he follow your instructions?

A. Yes, sir.

Q. And did he then provide you with the trash?

A. Yes, sir.

Q. In what form was the trash when you got it?

A. I think on that particular day there were four different container trash bags; and I was only able to remove one of them from the actual bin.

Q. What happened to the other three?

A. They were inadvertently pushed in with all the rest of the refuse.

Q. On the one that you got, where did you take that?

A. Back to the Laguna Beach Police Department.

Q. Did you then go through the trash that was in the receptacle?

A. Yes, sir. (147:15-149:18)

Minutes of October 4, 1984

IN THE MUNICIPAL COURT
OF SOUTH ORANGE COUNTY JUDICIAL DISTRICT
COUNTY OF ORANGE, STATE OF CALIFORNIA

The People of the State of California, Plaintiff,	vs.	(Billy E. Greenwood (Dyonne Van Houten (Cathy Lee Allegar Defendants

Defendant(s) Billy Greenwood, Dyonne Van Houten, Cathy Allegar present and in court with counsel Mike Garey, B. November, DPD, Max DeLiema.

It appearing to me from the examination that the public offense(s) in the within complaint mentioned FELONY, to wit: 11351 H&S, 11350 H&S, 11359 H&S, 11377(a) H&S, has been committed, and that there is sufficient cause to believe the within named defendant(s) Billy Greenwood, Dyonne Van Houten guilty thereof, the motion of the deputy district attorney William Feccia that the defendant(s) be held to answer to count( ) # I, II, III, IV & V is granted for defendant(s) Greenwood & Van Houten ordered held to answer to the same, and further ordered to appear in Dept. # 43 of the Superior Court at 9:00 a.m. on October 15, 1984

Date: October 4, 1984 Blair Barnett, Judge
of the South Orange County
Judicial District

Filed in open Superior Court of the State of California, in and for the County of Orange, on motion of the District Attorney of said Orange County, this 15th day of October, 1984
LEE A. BRANCH, COUNTY CLERK

By: /s/ Diane L. McHugh
Deputy

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. BILLY E. GREENWOOD DYANNE CHERYL VAN HOUTEN Defendant(s)	Case No. C-55040 INFORMATION

COUNT I: The District Attorney of the County of Orange, by this Information, hereby accuses BILLY E. GREENWOOD and DYANNE CHERYL VAN HOUTEN of a Felony, to-wit: Violation of Section 11351 of the Health and Safety Code of the State of California (POSSESSION FOR SALE OF NARCOTIC), in that on or about April 6, 1984, in the County of Orange, State of California, the said defendant(s) did willfully, unlawfully and feloniously have in his/their possession for sale a controlled substance, to-wit: Cocaine.

COUNT II: And the said BILLY E. GREENWOOD and DYANNE CHERYL VAN HOUTEN is/are hereby

accused by the District Attorney of the County of Orange, by this second count of this Information, of a Felony, to-wit: Violation of Section 11350 of the Health and Safety Code of the State of California (POSSESSION OF NARCOTIC), in that on or about April 6, 1984, in the County of Orange, State of California, the said defendant(s) did willfully, unlawfully and feloniously have in his/their possession a controlled substance to-wit: Cocaine.

COUNT III: And the said BILLY E. GREENWOOD is/are hereby accused by the District Attorney of the County of Orange, by this third count of this Information, of a Felony, to-wit: Violation of Section 11359 of the Health and Safety Code of the State of California (POSSESSION OF MARIJUANA FOR SALE), in that on or about April 6, 1984, in the County of Orange, State of California, the said defendant(s) did willfully, unlawfully and feloniously have in his/their possession for purpose of sale marijuana.

COUNT IV: And the said BILLY E. GREENWOOD is/are hereby accused by the District Attorney of the County of Orange, by this fourth count of this Information, of a Felony, to-wit: Violation of Section 11377(a) of the Health and Safety Code of the State of California (POSSESSION OF DANGEROUS DRUG), in that on or about April 6, 1984, in the County of Orange, State of California, the said defendant(s) did willfully, unlawfully and feloniously have in his/their possession a controlled substance, to-wit: Psilocybin.

COUNT V: And the said BILLY E. GREENWOOD is/are hereby accused by the District Attorney of the County of Orange, by this fifth count of this Information, of a Felony, to-wit: Violation of Section 11359 of the Health and Safety Code of the State of California (POSSESSION OF MARIJUANA FOR SALE), in that on or about May 12, 1984, in the County of Orange, State of California, the said defendant(s) did willfully, unlawfully and feloniously have in his/their possession for purpose of sale marijuana.

Contrary to the form, force and effect of the Statute in such cases made and provided, and against the peace and dignity of the People of the State of California.

DATED: October 15, 1984

CECIL HICKS,
DISTRICT ATTORNEY,
COUNTY OF ORANGE,
STATE OF CALIFORNIA

By: /s/ Jill Roberts
Deputy District Attorney

Superior Court Minutes
of October 15, 1984

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE

JUDGE: David D. Carter

REPORTER: Linda Morgan DATE: 10-15-84

CLERK: Diane L. McHugh BALIFF: Steve Scott

TIME: 9:00 a.m. D-43
C-55040 People vs. Van Houten, Dyanne Cheryl

HEARING RE: Arraignment

(X) At 11:30 a.m. DFDT IN CT WITH CSL MARGARET ANDERSON, DEP. P.D.

(X) INFO PRESENTED TO DFDT AND ORD FILED

(X) DFDT WAIVED ADVISEMENT OF HIS LEGAL AND CONSTITUTIONAL RIGHTS, DFDT ARRAIGNED

(X) DFDT WAIVED READING OF INFOR

(X) TO INFO DFDT NOW PLEADS NOT GUILTY TO EACH CT

(X) Dfdt denied alleged prior convictions/use/armed allegations as set forth in the (amended) info/indt

(X) CASE SET FOR TRIAL ON DECEMBER 3, 1984 AT 9:00 a.m. IN DEPT. 43

(X) PRETRIAL SET FOR November 30, 1984 AT 8:00 a.m. IN DEPT. 43

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE

JUDGE: David D. Carter

REPORTER: Linda Morgan DATE: 10-15-84

CLERK: Diane L. McHugh BAILIFF: Steve Scott

TIME: 9:00 a.m. D-43
C-55040 People vs. Greenwood, Billy

HEARING RE: Arraignment

(X) DFDT IN CT WITH CSL MIKE GAREY

(X) PEOPLE REP BY JILL ROBERTS

(X) INFO PRESENTED TO DFDT AND ORD FILED

(X) DFDT WAIVED ADVISEMENT OF HIS LEGAL AND CONSTITUTIONAL RIGHTS, DFDT ARRAIGNED

(X) DFDT WAIVED READING OF INFOR

(X) TO INFO DFDT NOW PLEADS NOT GUILTY TO EACH CT

(X) CASE SET FOR TRIAL ON DECEMBER 3, 1984 AT 9:00 a.m. IN DEPT. 43

(X) PRETRIAL AND MOTIONS SET FOR NOVEMBER 30, 1984 AT 8:00 a.m. IN DEPT. 43

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Attorneys for Defendant Greenwood

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR
THE COUNTY OF ORANGE

The People Of The State Of California, Plaintiff, vs. Bill Greenwood, et al., Defendents.	Case Number C-55040 Notice Of Motion And Motion to Set Aside Information Pursuant To Penal Code § 995. Date: November 30, 1984 Time: 9:00 a.m. Dept: 43 Time Estimate: ½ Hour (Filed February 1, 1985)

TO CECIL HICKS, DISTRICT ATTORNEY FOR THE COUNTY OF ORANGE, AND TO THE CLERK OF THE ABOVE ENTITLED COURT:

PLEASE TAKE NOTICE that on November 30, 1984, at 9:00 a.m., in Department 43 of the above entitled Court, Defendant GREENWOOD will and does hereby move the court for an order setting aside all counts of the Information.

This motion is made on the grounds that:

1. The defendant was committed without reasonable or probable cause; and

2. The defendant was not legally committed by a magistrate.

This motion will be submitted on the transcripts of the preliminary hearing, the court's file, the pleadings, the points and authorities to be submitted, and upon the arguments of counsel.

Dated November 15, 1984.

Respectfully submitted,

GAREY & BONNER

By /s/ Michael Ian Garey
Attorney for Defendant Greenwood

Law Offices Of
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Attorneys for Defendant Greenwood

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE

The People Of The State Of California, Plaintiff, vs. Bill Greenwood, et al., Defendants.	Case Number C-55040 Points And Authorities In Support Of Motion To Set Aside Information Pursuant To Penal Code § 995. Date: November 30, 1984 Time: 9:00 a.m. Dept: 43 (Filed February 1, 1985)

STATEMENT OF FACTS

A preliminary hearing and motion to suppress in this matter were heard on October 2nd, 3rd, and 4th, 1984, before the Hon. Blair Barnette, Judge presiding. The following is a summary of those proceedings as herein relevant.

At the outset of the proceedings, the court heard motions to quash the two search warrants,[1] on the grounds

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[1] See, Exhibits "A" and "B".

that on their face, the warrants were based on unlawful controlled trash collections. The motions were denied. (PT I:[2] 5-37, 37)

Officer Jenny Stracner, of the Laguna Beach Police Department testified that on April 6, 1984, she executed a search warrant on 1575 Fayette Place in Laguna Beach. (PT I: 42-43) As she and other officers approached the french doors to the residence, she could observe the interior. She saw Defendant Greenwood, Van Houten, and Alleger. (PT I: 44) Greenwood was standing on the staircase, Alleger was in the upstairs bedroom near the balcony, and Van Houten (apparently after the entry) was in the downstairs bedroom. (PT I: 45) The officers knocked and announced their purpose and demanded entry, after which Greenwood ran upstairs, and Alleger ran out of sight. (PT I: 46-49) After repeating the announcement, and receiving no response at the door, one of the officers kicked the door open. (PT I: 49) Stracner searched the upstairs bedroom, bathroom, and closet. In the bathroom, standing in the shower, she located Greenwood, who then came out of the shower stall, fully clothed. (PT I: 49-51) In a small trash can next to the toilet, Stracner located a baggie of cocaine. (PT I: 52-53) Laboratory analysis confirmed that this item contained 13.85 grams of cocaine. On an upstairs balcony, Stracner also found a paper bindle containing 2.2 grams of cocaine. (PT I: 55-56) On a bed in the upstairs bedroom she located a yellow writing tablet with white powder residue. There was a straw laying on the bed with white powder residue. On the floor in

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[2] Refers to transcript of October 2, 1984.

the bedroom was a purse, later identified as belonging to Van Houten, in which Stracner found a bindle containing 1.12 grams of cocaine. (PT I: 56-57) Also on the bed were a sifter and grinder. (PT I: 58)

Stracner also searched the garage, and found a bag of psilocybin mushrooms, and a 436-gram brick of hashish. (PT I: 59-60)

Stracner placed Defendant Greenwood under arrest, and found a straw and a bindle containing what appeared to be cocaine in his shirt pocket. (PT I: 64-65)

In a Captain's table downstairs she found a Bank of America Bank book, and Greenwood's passport.

Stracner's opinion was that the cocaine found in the bathroom was for personal use. She opined that the hash was possessed for sale. (PT I: 71-72)

Also searched was a guest house on the premises, which showed signs of being occupied. (PT I: 7) In the information from the informant, the guest house was not distinguished from the main house. (PT II: 11)

On Friday, April 6, 1984, Stracner, having previously decided to do so, conducted a warrantless controlled pick up of the trash at 1575 Fayette Place. (PT I: 73-79) She thereafter searched through the rubbish, and found items indicative of drug use. (PT II: 3-5)[2] The information that was gleaned from the trash search was then recited in the affidavit in support of the search warrant. (PT II: 5) Stracner had occasion to examine the trash from 1575

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[2] (sic) Refers to transcript of October 3, 1984.

Fayette on numerous occasions from February to April of 1984, and maintained surveillance on the residence during that period. (PT II: 24-25)

Investigator Robert Rahaeuser of the Laguna Beach Police Department testified that he executed (a second) search warrant at 1575 Fayette Place on May 12, 1984. (PT II: 47) After knocking and announcing themselves, the executing officers forced entry. (PT II: 49-50) Once inside, the officer encountered Defendant Greenwood, who was part of the way down the stair case (in the main house). (PT II: 51) Rahaeuser discovered 2.2 grams of hashish in the kitchen. He also found a pound of marijuana in the garage. Fifteen hundred dollars in cash were also located as well as some personal papers. (PT II: 52-54) It was Rahaeuser's opinion that the contraband was possessed for sale, as well as that located in the April search. (PT II: 57-59) Investigator Stracner testified that the cocaine located in Van Houten's purse was possessed for sale. (PT II: 107-111)

Rahaeuser further explained that he conducted surveillance on 1575 Fayette Place during the month of May, 1984. On May 4th, he arranged for and conducted a controlled trash pickup and search of the trash from 1575 Fayette Place. (PT II: 59-61) In the trash, he located five short tubes, empty paper bindles, and a clear bag with marijuana fragments. This had not been the first time he searched the trash from 1575 Fayette Place; he had done so in the month of April; he had not attempted to obtain a search warrant to seize and examine the trash on May 4th. (PT II: 63)

Rahaeuser participated in a (second) search of the residence on May 12, 1984. After the second knock and

announcement, Rahaeuser did hear a male voice saying something, though Rahaeuser could not determine what it was. He thought someone was saying "hold on" or I'm coming," or "just a minute."

Defendant's motions to suppress were denied, and he was held to answer. (See, PT III:26)

POINTS, AUTHORITIES AND ARGUMENT

I

THE SEARCH WARRANTS FOR 1575 FAYETTE WAS INVALID.

While this case involves two separate search warrants, the issues relating to each may be discussed together, since each bears the same defect. For each warrant contains a probable cause showing that is based on an unlawful warrantless search of the trash cans at 1575 Fayette. In each case, the remaining evidence in the warrants are not even arguably sufficient to support the warrants' issuance.

It has been held that evidence which is itself the product of an illegal search or seizure may not be used to support the issuance of a search warrant. (*Raymond v. Superior Court* [1971] 19 Cal.App.3d 321, 327; *People v. Superior Court* [*Sosa*] [1982] 31 Cal.3d 883.)

In the present case, the warrants were based on warrantless searches of trash containers. Such searches have been held unlawful by the California Supreme Court under both the State *and* Federal Constitutions. (*People v. Krivda* [1971] 5 Cal.3d 357; *People v. Krivda* [1973] 8 Cal.3d 623).

In *People v. Krivda, supra,* 5 Cal.3d 357, the California Supreme Court ruled on facts identical to those in the

present case, that the controlled pick-up and search of a suspect's trash was unlawful. In so holding, the court relied heavily on the United States Supreme Court decision in *Katz v. United States*, 347, 350-352 [88 S.Ct. 507, 19 L.Ed.2d 576], and utilized the standard enunciated in *Katz*, which focuses on whether or not the suspect has exhibited a reasonable expectation of privacy and whether or not that expectation has been violated by unreasonable government intrusion. The Supreme Court in *Krivda* also relied upon its own prior decision in *People v. Edwards* (1971) 71 Cal.2d 1096, 1104, in which a trash can search was held unlawful. The court in *Edwards* has relied largely on Federal decisions. In concluding, the court found that the search violated *both* State and Federal Standards of reasonableness. The court therein stated, *Id.*, 71 Cal.2d:

> It is also clear that defendants' reasonable expectation of privacy was violated by unreasonable governmental intrusion. The United States Supreme Court repeatedly "has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes [citation], and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (*Katz v. United States, supra*, 389 U.S. 347, 357, 88 S.Ct. 507, 514.) In the instant case it does not appear that any of the exceptions apply to the search of the trash can. Accordingly, that search was unlawful under the Fourth Amendment of the federal Constitution. It similarly violated article I, section 19, of the California Constitution. The trial court thus erred in admitting the evidence found in the trash can.

Subsequently, the United States Supreme Court on certiorari, remanded the case to the California Supreme Court, because the remanding Supreme Court could not determine whether *People v. Krivda, supra,* 5 Cal.3d 357, had been decided on Federal or State grounds. In so ruling, the United States Supreme Court expressed no view on whether or not such trash searches were unlawful. *California v. Krivda* (1972) 409 U.S. 33, 35 [93 S.Ct. 32; 34 L.Ed. 2d 45, 46].

The California Supreme Court responded to the mandate, clearly, and unambiguously ruling that its original decision in *Krivda* was decided on *both State and Federal* grounds. In so holding, the court stated, *People v. Krivda* (1973) 8 Cal.3d 613,

> Pursuant to the mandate hereinabove quoted we have reexamined our opinion in the subject case (reported at 5 Cal.3d 357, 96 Cal.Rptr. 62, 486 P.2d 1262) and certify that we relied upon both the Fourth Amendment to the United States Constitution and article I, section 19, of the California Constitution, and that accordingly the latter provision furnished in independent ground to support the result we reached in that opinion. Inasmuch as we deem it unnecessary to alter or amend our prior decision, we reiterate that decision in its entirety.

While it is true that there are some Federal Circuit Court decisions holding that such trash searches are proper, (see, e.g., *U.S. v. Terry* [2nd Cir. 1983] 702 F.2d 299), such decisions are not binding on any California Court. The rule in this regard is well stated in the case of *People v. Willard* (1965) 238 Cal.App.2d 292, 305:

> Finally, we bear in mind that while we are bound by decisions of the United States Supreme Court interpreting the federal Constitution (U.S. Const., art.

> VI, § 2; *Mackenzie v. Hare* (1913) 165 Cal. 776, 779, 134 P. 713, L.R.A. 1916, 127, affirmed 239 U.S. 299; *Moon v. Martin* (1921) 185 Cal. 361, 366, 197 P. 77; *Perkins Mfg. Co. v. Jordan* (1927) 200 Cal. 667, 678-679, 254 P. 551; *Turkington v. Municipal Court* (1948) 85 Cal.App. 2d 631, 650, 193 P.2d 795) we are not bound by the decisions of lower federal courts even on federal questions although they are persuasive and entitled to great weight. (*Stock v. Plunkett* (1919) 181 Cal. 193, 194-195, 183 P. 657.)

(In accord, People v. Cummings [1975] 43 Cal. App.3d 1008.)

This court and all California courts are, however, clearly bound by the decisions of the California Supreme Court. As stated in the case of *Triggs v. Superior Court* (1973) 8 Cal. 3d 884, 890-891:

> Our statements of law remain binding on the trial and appellate courts of this state (*People v. McGuire*, 45 Cal. 56, 57-58; *Latham v. Santa Clara County Hospital*, 104 Cal.App.2d 336, 340, 231 P.2d 513; *Globe Indemnity Co. v. Larkin*, 62 Cal.App.2d 891, 894, 145 P.2d 633.)

Accordingly, since the California Supreme Court has ruled that trash searches violate *both* the State and Federal Constitutions, this court is bound by that holding, and must follow it. This court, it is respectfully submitted, has no authority to do other than quash the warrant in the present case.

II

THE WARRANT FOR 1575 FAYETTE PLACE WAS INVALID BECAUSE PROBABLE CAUSE WAS NOT ESTABLISHED AS TO EACH DWELLING UNIT.

The testimony at the combined preliminary hearing and motion to suppress established that two separate oc-

cupied living units existed on the premises at 1575 Fayette.[3] However, the affidavits in support of the two search warrants do not relate any of the probable cause showing to either of the living units. Under such circumstances, it is respectfully submitted that the warrant should have been, and should be, declared void. As stated in the case of *People v. Sheehan* (1972) 28 Cal.App.3d 21, 24:

> Under the foregoing circumstances it is unnecessary to consider the propriety of the entries under which the information for the affidavit for the search warrant was obtained. (See, however, Pen.Code, § 855; and note People v. Coulon (1969) 273 Cal.App.2d 148, 155, fn. 8, 78 Cal.Rptr. 95.) There was nothing in the affidavit which would authorize the issuance of a warrant for the search of the habitation occupied by the defendant. In People v. Estrada (1965) 234 Cal.App. 2d 136, 44 Cal.Rptr. 165, this court noted, ". . . when a warrant direst (sic) a search of a multiple occupancy apartment house or building, absent a showing of probable cause for searching each unit or for believing that the entire building is a single living unit, the warrant is void and a conviction obtained on evidence seized under it cannot stand. [Citations.]" (234 Cal. App.2d at p. 146, but cf. generally pp. 144-49, 44 Cal. Rptr. at p. 172; and People v. Fitzwater (1968) 260 Cal.App.2d 478, 485-488, 67 Cal.Rptr. 190.)

Nor can the fact that the officers in this case were simply unaware of which dwelling unit related to their probable cause showing, offer the People any solace. The court in Sheehan, went on to state, *Id.*, 28 Cal.App.3d at 26:

> The foregoing distinction is rather tenuous when viewed in the light of the fact that the defendant

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[3] One unit is referred to as the "guest house" and the other as the "main house."

Coulon and his companion were camped 300 yards upstream from the nearest campsite and in a place from which no other inhabited place could be seen. (*Id.*, p. 152, 78 Cal.Rptr. 95.) The views expressed in the dissenting opinion in *Coulon* are more convincing. Ignorance should not substitute for the necessity of particularly describing the place to be searched, and of showing probable cause to believe that there is contraband at that place. The principle recognized in People v. Estrada, supra, against searching several living units upon a showing of probable cause to search one, applies to the facts revealed in this case.

And other cases on this point are analytically in accord, see e.g.: *People v. Cook* (1978) 22 Cal.3d 67, 97; *People v. Joubert* (1981) 118 Cal.App.3d 637, 650-651; *People v. Joubert* (1983) 140 Cal.App.3d 946, 950-951.

In the present case, the officers knew, prior to each search that there was a separate guest house in the premises. The probable cause showing did not distinguish between the two. The warrant should be held void.

CONCLUSION

In view of the foregoing, it is respectfully submitted that this motion should be granted. No evidence, other than that which was the product of an unlawful search and seizure, was adduced to support the order holding Defendant Greenwood to answer.

Dated November 19, 1984.

Respectfully submitted,

GAREY & BONNER

/s/ By Richard W. Bonner for MIG
Michael Ian Garey
Attorneys for Defendant Greenwood

ATTESTED: 9-21-84

Certified to be a true copy of the original on file in my office James B. Harris, Clerk, Municipal Court,

South Orange County Judicial District, Orange County, California

By C. Spence
Deputy

(Filed May 17, 1984)

IN THE MUNICIPAL COURT OF SOUTH JUDICIAL DISTRICT COUNTY OF ORANGE, STATE OF CALIFORNIA

SEARCH WARRANT

THE PEOPLE OF THE STATE OF CALIFORNIA:

TO: ANY SHERIFF, CONSTABLE, MARSHAL, POLICEMAN OR ANY OTHER PEACE OFFICER IN THE COUNTY OF ORANGE, STATE OF CALIFORNIA:

Proof, by affidavit, having been made this day before me by Investigator Robert RAHAEUSER that there is probable and reasonable cause for the issuance of the Search Warrant in accordance with Subdivision(s) 2, 3 & 4 of the Penal Code, Section 1524.

YOU ARE THEREFORE COMMANDED between the hours of 7:00 am and 10:00 pm good cause being shown therefor, to make search of the premises located at and described as:

1575 Fayette Place, Laguna Beach, County of Orange, California. Further described as a two story tan stucco/wood structure with a separate tan stucco/wood structure guest house. The guest house is located on the northside of the

two story structure. The numbers 1575, black in color, are affixed to the attached garage door. The residence to be searched is situated on the westside of Fayette Place and is the first structure south of the intersection of Panorama Drive and Fayette Place.

and the vehicle(s) described as: N/A

and the person(s) of: N/A

for the following personal property, to-wit: Cocaine, packaging materials for cocaine such as paper bindles, plastic baggies, glass vials, paraphernalia for cutting cocaine, such as razor blades, playing cards, mirrors and straws used to inhale cocaine, cutting agents for cocaine such as lactose, manitol, milksugar and procaine; scales and documents of personal property consisting of utility receipts, rent receipts, cancelled mail envelopes and telephone bills. Currency and documents tending to show narcotic transactions including pay and owe sheets, phone numbers and addresses of other individuals involved in narcotic transactions. Also the ability to monitor incoming phone calls during the execution of the search warrant.

and if you find the same or any part thereof, to bring it forthwith before me at the Municipal Court of South Judicial District for the County of Orange, or to any other court in which the offense(s) in respect to which the property or things taken is triable, or retain such property in your custody, subject to the order of the Court pursuant to Section 1536 of the Penal Code.

Given under my hand this 9 day of May, 1984.

/s/ Pamela Iles
Judge of the Municipal Court

ATTESTED: 9-21-84

Certified to be a true copy of the original on file in my office James B. Harris, Clerk, Municipal Court,

South Orange County Judicial District, Orange County, California

By C. Spence
Deputy

(Filed May 9, 1984)

SW 0605

IN THE MUNICIPAL COURT South
JUDICIAL DISTRICT COUNTY OF ORANGE,
STATE OF CALIFORNIA

STATE OF CALIFORNIA
) ss
COUNTY OF ORANGE

AFFIDAVIT IN SUPPORT
OF SEARCH WARRANT

Personally appeared before me this 9th day of May 1984, Inv. Robert RAHAEUSER, who, on oath, makes complaint, and deposes and says:

That he has, and there is just, probable and reasonable cause to believe, and that he does believe that there is now on the premises located at 1575 Fayette Place, Laguna Beach, County of Orange California. Further described as a two story tan stucco/wood structure with a separate tan stucco/wood structure guest house. The guest house is located on the northside of the two story structure. The numbers 1575, black in color, are affixed to the attached garage door. The residence to be searched is situated on the westside of Fayette Place and is the first structure south of the intersection of Panorama Drive and Fayette Place.

and on the person(s) of: N/A

the following personal property, to-wit: Cocaine, packaging materials for cocaine such has paper bindles, plastic baggies, glass vials, paraphernalia for cutting cocaine, such as razor blaces, playing cards, mirrors and straws used to inhale cocaine, cutting agents for cocaine such as lactose, manitol, milksugar and procaine; scales and documents of personal property consisting of utility receipts, rent receipts, cancelled mail envelopes and telephone bills. Currency and documents tending to show narcotic transactions including pay and owe sheets, phone numbers and addresses of other individuals involved in narcotic transactions. Also the ability to monitor incoming phone calls during the execution of the search warrant.

Your affiant says that there is probable and reasonable cause to believe and that he does believe that the said property constitutes

(See P.C. § 1524) property and things used as a means of committing a felony and are in the possession of persons with the intent to use it with the means of committing a public offense and consists of evidence which tends to show a felony has been committed and that the suspect has committed a felony.

Your affiant says that the facts in support of the issuance of the Search Warrant are as follows: that your affiant is a sworn police officer and has been so employed for four (4) years;

That your affiant, while acting in said capacity, has received the following information: On April 11, 1984 at approximately 0900 hours Your Affiant spoke with Investigator STRACNER, Laguna Beach Police Department, regarding a search warrant that was executed on April 6,

1984 at 1575 Fayette Place, Laguna Beach. Investigator STRACNER informed Your Affiant of all the facts collected during that investigation and subsequently related in her affidavit in support of search warrant which was signed by the Honorable Pamela ILES, Judge of the South Orange County Municipal Court, on April 6, 1984. Your Affiant also viewed all items of contraband which were seized at the Fayette Place location and was informed of the four subjects who were arrested upon culmination of that investigation. Refer to the attached certified copies of Investigator STRACNER's search warrant, affidavit in support of search warrant and return of search warrant labelled exhibits 1, 2 and 3. Your Affiant states that between April 16, 1984 and May 3, 1984 he had contact with a citizen informant on three separate occasions who reported an increase in vehicular traffic at 1575 Fayette Place, Laguna Beach. The informant advised Your Affiant that numerous vehicles have been seen arriving and departing from 1575 Fayette Place in the early morning hours, 0200 to 0400 hours. The informant told Your Affiant that the occupants of these vehicles would enter the Fayette Place location and depart from same a short time later, only staying at this location for approximately ten to fifteen minutes. Your Affiant was last contacted by the informant on May 3, 1984 at which time he/she reiterated the amount of traffic which was still ocurring at 1575 Fayette Place. It should be noted this is the same citizen informant who supplied Investigator STRACNER with information which she incorporated in her affidavit in support of search warrant. The informant's residence is situated in such a manner that all vehicular/pedestrian traffic ocurring at 1575 Fayette is clearly viewed. The informant told Your Affiant that his/her sole motive for re-

contacting Laguna Beach Police Department after the April 6th arrests was that the "same unusual activity" was again taking place at the Fayette Place location. On May 3, 1984 at approximately 0900 hours Officer ISHMAEL contacted Your Affiant at Laguna Beach Police Department to report an incident which ocurred at 1575 Fayette Place earlier that morning. Officer ISHMAEL advised Your Affiant he was dispatched to 1575 Fayette Place at approximately 0400 hours reference a disturbance call. Upon arrival Officer ISHMAEL saw four vehicles parked in front of that location. Officer ISHMAEI recorded these license plate numbers and later gave them to Your Affiant. Your Affiant checked with Department of Motor Vehicles regarding the registered owners of these vehicles and discovered none were registered at 1575 Fayette Place. Officer ISHMAEL also advised Your Affiant that when he contacted a female occupant of that residence reference the disturbance complaint, she appeared extremely nervous to view his presence. Officer ISHMAEL related to Your Affiant that this female subject only opened the front door a very small distance and then immediately exited the residence closing the front door behind herself. While Officer ISHMAEL was conversing with this female subject outside the residence he viewed two of three subjects peeping through curtains inside the residence. On May 4, 1984 Your Affiant observed a white male adult, 6'0, 175 pounds with black hair open the garage door at the listed location, and put three trash containers outside on the public street to be picked up. Your Affiant then contacted the trash collector and advised him that Your Affiant wanted to collect the trash at that residence. Your Affiant told the collector that the trash container in which the trash was to be emptied into must be

clean of any other refuge. Your Affiant then observed the collector pick up the refuge at 1575 Fayette. The collector then gave this refuse to Your Affiant. It should be noted the male subject who Your Affiant viewed place the trash outside the Fayette location, walked up and down the street as if surveilling the immediate area prior to the collector's arrival and maintained a constant view on his trash while the collector preformed his duties. Your Affiant then returned to the Laguna Beach Police Department and began searching the refuge for contraband. During this procedure Your Affiant discovered five two inch plastic straws, one prefolded paper bindle and a plastic zip lock baggie containing a very small amount of a green leafy substance. This same refuge also contained addressed mail to 1575 Fayette Place and a dry cleaning bill addressed to GREENWOOD. Your Affiant has personal knowledge that Billy GREENWOOD was arrested at 1575 Fayette Place for narcotic related offenses on April 6, 1984. Due to an error in the collector's method of obtaining the refuge only one of three trash bags were collected. On May 4, 1984 Your Affiant gave the listed plastic straws containing a white powder residue to Forensic Specialist GILLIAM, an employee for Laguna Beach Police Department, to be tested. GILLIAM conducted a presumptive test on the residue found in each straw and found it to test positive for cocaine. GILLIAM has conducted over sixty presumptive tests for controlled substances, twenty-six of the tests were for cocaine. GILLIAM has a Bachelor of Arts degree with a minor in science and has 120 hours in chemical analysis. Refer to GILLIAM's evidence examination report, labelled as Exhibit number 4. It should be noted that GILLIAM has not testified in court concerning presumptive testion (sic). It is Your Affiant's belief based on the infor-

mation supplied by Investigator STRACNER coupled with the information supplied by the informant in addition to the contraband that was collected from the trash at 1575 Fayette Place, that the occupants of that residence are continuing to possess controlled substances for sale and personal use. It is your Affiant's personal knowledge that subjects who sell controlled substances tend to keep in their residence a supply of cocaine along with paraphernalia used in packaging and sales of controlled substances including paper bindles, plastic baggies, scales and currency to show excessive narcotic transactions. It is also Your Affiant's opinion that there is at the premise to be searched quantities of cocaine. Your Affiant has been a police officer for the past four years and has worked narcotic enforcement for the past three years. Your Affiant has spent over 250 hours in schools and training dealing in the packaging, sales, transportation and recognition of narcotics and dangerous drugs. Your Affiant has conducted over 300 investigations involving controlled substances and marijuana. Your Affiant has spoken to persons who used, transported and sold dangerous drugs, controlled substances and marijuana at least 200 times.

Your affiant has reasonable cause to believe that grounds for the issuance of a Search Warrant exist, as set forth in Section 1524 of the Penal Code, based upon the aforementioned facts and circumstances.

Your affiant prays that a Search Warrant be issued, based upon the above facts, for the seizure of said property, or any part thereof, between the hours of 7:00 am and 10:00 pm, good cause being shown therefore, and that the same be brought before this Magistrate or retained subject to the other of the court, or of any other court in

which the offense(s) in respect to which the property or things taken, is triable, pursuant to Section 1536 or the Penal Code.

/s/ Robert Rahaeuser
(Affiant)

Subscribed and sworn to before me this 9 day of May, 1984, at 10:00 .M. (sic)

/s/ Pamela Iles
Judge of the Municipal Court

WHEREFORE, it is prayed that a Search Warrant issue.

CECIL HICKS,
DISTRICT ATTORNEY
COUNTY OF ORANGE,
STATE OF CALIFORNIA.

/s/ By: C. E. Robison
Deputy District Attorney

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*EXHIBIT 1

I hereby certify that the attached document consisting of 2 page(s) is a true and correct copy of the original search warrant on file in my office.

JAMES B. HARRIS
Clerk & Adm. Officer

By C. Spence
Deputy

(Filed April 16, 1984)

0600

IN THE MUNICIPAL COURT OF South
COUNTY OF ORANGE,
JUDICIAL DISTRICT
STATE OF CALIFORNIA

SEARCH WARRANT

THE PEOPLE OF THE STATE OF CALIFORNIA:

TO: ANY SHERIFF, CONSTABLE, MARSHAL, POLICEMAN OR ANY OTHER PEACE OFFICER IN THE COUNTY OF ORANGE, STATE OF CALIFORNIA:

Proof, by affidavit, having been made this day before me by Investigator Jenny STRACNER that there is probable and reasonable cause for the issuance of the Search Warrant in accordance with Subdivision(s) 2, 3 & 4 of the Penal Code, Section 1524.

YOU ARE THEREFORE COMMANDED between the hours of 7:00 am and 10:00 pm good cause being shown therefor, to make search of the premises located at and described as:

1575 Fayette Place, Laguna Beach, County of Orange, California. Further described as a two story tan stucco/wood structure with a seperate tan stucco/wood structure guest house. The guest house is located on the northside of the two story structure. The numbers 1575, black in color, are affixed to the attached garage door.

and the vehicle(s) described as: N/A

and the person(s) of: N/A

for the following personal property, to-wit: Cocaine, packaging materials for cocaine such as paper bindles, plastic baggies, glass vials, paraphernalia for cutting cocaine, such as razor blades, playing cards, mirrors and straws used to inhale cocaine, cutting agents for cocaine such as lactose, manitol, milksugar and procaine; scales and documents of personal property consisting of utility receipts, rent receipts, cancelled mail envelopes and telephone bills. Currency and documents tending to show narcotic transactions

including pay and owe sheets, phone numbers and addresses of other individuals involved in narcotic transactions. Also the ability to monitor incoming phone calls during the execution of the search warrant.

and if you find the same or any part thereof, to bring it forthwith before me at the Municipal Court of South Judicial District, for the County of Orange, or to any other court in which the offense(s) in respect to which the property or things taken is triable, or retain such property in your custody, subject to the order of the Court pursuant to Section 1536 of the Penal Code.

Given under my hand this 6 day of April, 1984.

/s/ Pamela Iles
Judge of the Municipal Court

I hereby certify that the attached document consisting of the 6 pages gives a true and correct copy of the original affidavit on file in my office.

JAMES B. HARRIS
Clerk & Adm. Officer

/s/ By: G. Spence
Deputy

* EXHIBIT 2

(Filed April 16, 1984)

Sid 0600

IN THE MUNICIPAL COURT SOUTH JUDICIAL DISTRICT, COUNTY OF ORANGE, STATE OF CALIFORNIA

STATE OF CALIFORNIA)		AFFIDAVIT IN
	) ss	SUPPORT OF
COUNTY OF ORANGE)		SEARCH WARRANT

Personally appeared before me this 6th day of April, 1984, Investigator Jenny STRACNER, who, on oath, makes complaint, and deposes and says:

That he has, and there is just, probable and reasonable cause to believe, and that he does believe that there is now on the premises located at: 1575 Fayette Place, Laguna Beach, County of Orange, California. Further described as a two story tan stucco/wood structure with a separate tan stucco/wood structure guest house. The guest house is located on the northside of the two story structure. The numbers 1575, black in color, are affixed to the attached garage door.

and in vehicle(s) described as: N/A

and on the person(s) of: N/A

the following personal property, to-wit: Cocaine, packaging materials for cocaine such as paper bindles, plastic baggies, glass vials, paraphernalia for cutting cocaine, such as razor blades, playing cards, mirrors and straws used to inhale cocaine, cutting agents for cocaine such as lactose, manitol, milksugar and procaine; scales and documents of personal property consisting of utility receipts, rent receipts, cancelled mail envelopes and telephone bills. Currency and documents tending to show narcotic transactions including pay and owe sheets, phone numbers and addresses of other individuals involved in narcotic transactions. Also the ability to monitor incoming phone calls during the execution of the search warrant.

Your affiant says that there is probable and reasonable cause to believe and that he does believe that the said property constitutes: (See P.C. § 1524) property and

things used as a means of committing a felony and are in the possession of persons with the intent to use it with the means of committing a public offense and consists of evidence which tends to show a felony has been committed and that the suspect has committed a felony.

Your affiant says that the facts in support of the issuance of the Search Warrant are as follows: that your affiant is a sworn police officer and has been so employed for three (3) years;

That your affiant, while acting in said capacity, has received the following information: During the month of February, 1984 Drug Enforcement Agent Rex McMILLAN contacted Your Affiant and advised their agency in Reno, Nevada had a subject in custody. McMILLAN stated the subject in custody related that a large U-haul moving truck was enroute to 1575 Fayette, Laguna Beach and that the truck was full of Thai, approximately 1000 pounds. McMILLAN and Your Affiant conducted an area check for the vehicle but were unable to locate it. During the month of February, 1984 Your Affiant was contacted by a citizen informant who lives at 1570 Fayette, Laguna Beach. This informant advised Your Affiant that she had observed numerous vehicle parked at 1575 Fayette and the occupants of these vehicles going into the residence and leave after only being there for approximately five minutes. The informant advised Your Affiant this activity took place between the hours of midnight (2400 hours) and four o'clock (0400 hours) in the morning. The informant also advised Your Affiant that a large U-Haul truck was parked in front of 1575 Fayette for four days, which appeared unusual to her. On February 15, 1984 Investigator

ISHMAEL and Your Affiant surveilled 1575 Fayette from eleven o'clock p.m. (2300 hours) until two o'clock (0200 hours) in the morning. During this time period Your Affiant observed four different vehicles arrive at 1575 Fayette at separate times, and leave at separate times. Neither vehicle stayed at 1575 Fayette for more than ten minutes at a time. It should be noted that on February 14, 1984 at eleven o'clock (2300 hours) at night Your Affiant surveilled the residence at 1575 Fayette until two-thirty (0230 hours) in the morning. During this time period Your Affiant observed four vehicle to arrive at separate times and depart at separate times. This type of vehicle traffic is indicative of narcotic activity. On February 23, 1984 the same citizen informant contacted Your Affiant and advised a large Jartan moving truck was parked in front of 1575 Fayette. Your Affiant then contacted investigator D. LAMBERT of the Orange County Sheriff's Department. Investigator LAMBERT arrived at the 1575 Fayette residence with his trained canine dog, Winston, to search the vehicle for any narcotics. The search had negative results. On this same date Sergeant JIMENEZ and Your Affiant followed this vehicle to 1611 Bayside Drive in Newport Beach. Your Affiant and Sergeant JIMENEZ contacted Newport Beach Police Department Investigator EVERTON in regards to 1611 Bayside Drive. Investigator EVERTON advised Your Affiant that 1611 Bayside Drive had at one time been under investigation for narcotic trafficking. On April 6, 1984 at 0600 hours Your Affiant drove past 1575 Fayette and observed four different vehicles at that residence. Your Affiant observed a white male, 6'0 175 with black hair, open the garage door at the listed address and put trash out to be picked up.

Your Affiant then contacted the trash collector and advised him that Your Affiant wanted to collect the trash at that residence. Your Affiant told the collector that the container in which the trash was to be emptied into must be clean of any other refuge. Your Affiant then observed the collector pick up the refuge at 1575 Fayette. The collector then gave the refuge to Your Affiant. Your Affiant then returned to Laguna Beach Police Department and began searching the refuge for contraband. Your Affiant found forty-two pre-folded bindles, most of which had a white residue on them, eleven straws commonly used to inhale cocaine, one paper bindle containing a white powdery substance possible cocaine, a plastic bag containing a white powder substance possibly cocaine, gross weight 3.3 grams, one glass vial and miscellaneous paperwork. It is Your Affiant's personal knowledge that subjects who sell and use controlled substances tend to keep in their residence a supply of cocaine along with paraphernalia used in the packaging and sales of controlled substances including bindles, plastic bindles, plastic baggies, scales and currency to show excessive narcotic transactions. It is also Your Affiant's opinion that there is at the premise to be searched, quantities of cocaine. Your Affiant has been a police officer for the past three years and has worked in narcotic enforcement for seven months. Your Affiant has spent over one hundred and thirty hours in schools and training dealing in the packaging, sales, transportation and recognition of narcotics and dangerous drugs. Your Affiant has conducted over fifty investigations involving controlled substances and cocaine. Your Affiant has spoken to persons who used, transported and sold dangerous drugs, controlled substances and cocaine at least fif-

teen times. Lt. Spriene conducted a presumptive test on the white powder substance in the plastic baggie and had negative results. Lt. Spriene also tested the white powder in the bindle and had a positive odor but negative on the color. It is of your affiants opinion and Lt. Spriene's opinion that the substance in the baggie was a filler used to cut cocaine and that the substance in the bindle is cocaine. However a lack of residue made the results negative. Lt. Spriene then tested a straw and received positive results. It should be noted that Lt. Spriene is currently a Lieutenant for the Laguna Beach Police Department and has been for the past 4 years. Prior to his position, Lt. Spriene worked at San Clemente Police Department and spent 4 years as an investigator in narcotic enforcement. Lt. Spriene has received training by his peers when he first became a narcotics officer. Lt. Spriene has trained personel in how to use the voltox during an eighty hour narcotic enforcement class conducted by the department of Justice. Lt. Spriene is considered an expert in court.

Your affiant has reasonable cause to believe that grounds for the issuance of a Search Warrant exist, as set forth in Section 1524 of the Penal Code, based upon the aforementioned facts and circumstances.

Your affiant prays that a Search Warrant be issued, based upon the above facts, for the seizure of said property, or any part thereof, between the hours of 7:00 am and 10:00 pm (Between the hours of 7:00 A.M. and 10:00 P.M.), good cause being shown therefore, and that the same be brought before this Magistrate or retained subject to the order of the court, or of any other court in which the offense(s) in respect to which the property or things

taken, is triable, pursuant to Section 1536 of the Penal Code.

/s/ Jenny Stracner
(Affiant)

Subscribed and sworn to before me
this 6th day of April, 1984, at 5:00 P.M.

/s/ Pamela Iles
Judge of the Municipal Court

WHEREFORE, it is prayed that a Search Warrant issue.

CECIL HICKS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA.

/s/ BY: William John Feccia
Deputy District Attorney

I hereby certify that the attached document consisting of 4 pages is a true and correct copy of the original return to S/W on file in my office.

James B. HARRIS
Clerk & Adm. Officer

BY: /s/ C. Spence
Deputy

EXHIBIT 3

(Filed April 16, 1984)

0600

IN THE MUNICIPAL COURT OF SOUTH
JUDICIAL DISTRICT COUNTY OF ORANGE,
STATE OF CALIFORNIA

RETURN TO SEARCH WARRANT

The following property was taken from the premises located at 1575 Fayette Place, Laguna Beach, County of

Orange, California. Further described as a two story tan stucco/wood structure with a separate tan stucco/wood structure guest house. The guest house is located on the northside of the two story structure. The numbers 1575, black in color, are affixed to the attached garage door.

by virtue of a Search Warrant, dated April 6, 1984, and executed by the Honorable Pamela ILES, Judge of the Municipal Court of South Judicial District for the County of Orange:

Blue tote bag

plastic bag containing 43.4 grams gross weight marijuana stems

plastic bag containing 42.8 grams marijuana stems, gross weight

plastic bag containing 7.3 grams hashish, gross weight

plastic bag containing 26.6 grams hashish, gross weight

plastic bag containing 6.1 grams marijuana seeds, gross weight

plastic bag containing 20.2 grams of psilocybin mushrooms, gross weight

plastic bag containing 22.7 grams of psilocybin mushrooms, gross weight

3 boxes of Mannite (.751 oz each)

plastic baggie with white powder substance

Tupperware container

Presto briefcase

36 plastic baggies with marijuana residue

"Long" chests

blue nylon tote bag

plastic bag containing 27.8 grams marijuana stems, gross weight

2 plastic bags

plastic bag containing 61.5 grams marijuana stems, gross weight

12 plastic baggies with marijuana residue

wooden cup and rod

roll of contact paper

Ohaus scale, gray

Triple beam gray scale, serial number 26482

Ohaus heavy duty scale 20K6-45 lb

33.6 grams of white powder, gross weight

plastic baggie with 19.7 grams of white powder, gross weight

3 vials of white powder

paper bindle containing 2.2 grams of white powder

2 magazine papers with white powder residue

grinder and strainer

pill box containing two Centrax RD552 and 1 Dalmane 30 Roche with one straw and white powder residue

partically (sic) burnt marijuana cigarette

California drivers license in name of GREENWOOD, Billy E.

roach clip

"Getting Off Cocaine" book

2 marijuana cigarettes

phone bill

belt

11 plastic baggies

miscellaneous paperwork

straw with white powder residue

(continued on page 3a)

I, Investigator Jenny STRACNER, by whom this Warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me under the Warrant.

All of the property taken by virtue of said Warrant will be retained in my custody subject to the order of this Court or of any other Court in which the offense(s) in respect to which the property or things taken is triable.

/s/ Jerry Stracner

Subscribed and sworn to before me
this 16th day of April, 1984.

/s/ Pamela Iles
Judge of the Municipal Court

plastic baggie containing 8.1 grams marijuana, gross weight

Zig-Zag book and straw with white powder residue

yellow metal Ricoh watch

white and yellow metal Rolex watch

white metal Ricoh watch with white stones

Ohaus scale

Presto buck knife

2 strainers

2 packages of Zig-Zag papers

3 spoons

4 pipes

pair of hemostats

6.1 grams marijuana, gross weight

glass tray

$845.00 U.S. currency

2 marijuana cigarettes

pack of Zig-Zag papers

pay and owe sheet

roach clip

Rolex yellow metal watch with white and red stones

Paget Quartz black watch

address book

$217.30 U.S. currency with yellow metal money clip

2 plastic baggies

plastic bag containing hash pipe with residue

straw with white powder residue

plastic baggie containing 2 grams white powder, gross weight

straw with white powder residue

$301.00 U.S. currency

4 white tablets in white bottle

26.5 grams of white powder

8 ounce jar of Mannitol

14 grm bottle of sparkle Mannitol

436. grams of hashish, gross weight

27.8 grams of hashish, gross weight

paper bag

850 Thunderbomb firecrackers

test tube with straw

straw

plastic baggie containing 3.1 grams white substance, gross weight

42 paper bindles

2 books of matches

10 straws with white powder residue
glass vial

10 plastic baggies with marijuana residue

paper napkin containing fragments of marijuana

miscellaneous paperwork in name of Cathy ALLEGER and Bill GREENWOOD

4.2 grams of hashish, gross weight

Passport book "GREENWOOD"

Bank of America savings book

4 GTE telephone bills

rental statement for storage

GTE receipt

brown "Echolic" briefcase containing the following:

folded white package with 28 oval light brown stones

folded white package with 2 round light blue stones

folded white paper package with the following:

plastic baggie with one "Blue Topaz" stone, 4.81K

plastic baggie with one "Blue Topaz" stone, 6.59K

plastic baggie with one "Blue Topaz" stone, 4.01K

plastic baggie with one "Blue Topaz" stone, 2.20 K

plastic baggie with one "Blue Topaz" stone, 11.89K

plastic baggie with one "Blue Topaz" stone, 7.80K

plastic baggie with one "Blue Topaz" stone, 2.40K

plastic baggie with one "Blue Topaz" stone, 2.68K

plastic baggie with one "Blue Topaz" stone, 2.32K

plastic baggie with one "Blue Topaz" stone, 31.66K

plastic baggie with one "Blue Topaz" stone, 11.93K

plastic baggie with one "Blue Topaz" stone, 3.47K

plastic baggie with one "Blue Topaz" stone, 2.90K

plastic baggie with one "Blue Topaz" stone, 3.59K

plastic baggie with one "Blue Topaz" stone, 3.08K

plastic baggie with one "Blue Topaz" stone, 2.21K

plastic baggie with one "Blue Topaz" stone, 2.68K

plastic baggie with one "Blue Topaz" stone, 35.42K

plastic baggie with one "Blue Topaz" stone, 2.69K

plastic baggie with one "Blue Topaz" stone, 6.64K

plastic baggie with one "Blue Topaz" stone, 3.45K

plastic baggie with one "Blue Topaz" stone, 8.61K

plastic baggie with one "Blue Topaz" stone, 6.34K

plastic baggie with four "Amethyst" stone, 4.93K

plastic baggie with one "Blue Topaz" stone, no markings

Echolac pouch with one yellow metal Rolex watch

Sanyo am-fm cassette player

Supreme Torch alarm

seven $2.00 bills

miscellaneous paperwork/files in name of "PALMIERI"

EXHIBIT 4

DR. NO.

LAGUNA BEACH POLICE DEPARTMENT
REQUEST FOR EVIDENCE EXAMINATION

PLEASE TYPE OR PRINT

Name: Greenwood (Suspect's or If Unavailable Give Victim(s)—; L.R. No.:—; Crime: H&S 11350; Date: (Of Offense)—5/4/84; Dept: (Submitting)—; Date Results Needed: ASAP.

Item No.—Describe Each Item of Evidence to be Examined

1 Five (5) Plastic Straws.

Investigating Officer: Rahawser; Dept. Investigation; Phone No:—; Date of Request: 5/04/84.

Type(s) of Examination(s) Requested On Above Items:

For Laboratory Use Only

Examination Results: Each straw was cut in half and both halfs placed on a grade #1 filter paper. A few grains of the control cocaine standard was placed on a grade #1 filter paper. Two drops of the reagent cobalt thiocyante was placed on the control standard which produced a blue positive color reaction. Two drops of cobalt thiocyante reagent was placed on each of five straws. Straw #1: Observed no blue presumptive reaction. Straw #2: Observed immediate blue presumptive positive. Straw #3: Observed immediate blue presumptive positive. Straw #4: Observed trace of blue presumptive positive and end portion of straw. Straw #5: Observed immediate blue presumptive positive.

The five (5) straws were individually sealed, the control standard was sealed. A polaroid photograph of test results was taken.

To Inv. Rahawser; Date 5/04/84
Sgt. Jimenez; Date 5/04/84

Forensic Specialist: Janet Gilliam

ATTESTED: 9-21-84

Certified to be a true copy of the original on file in my office.

James B. Harris, Clerk, Municipal Court
South Orange County Judicial District,
Orange County, California

By /s/ C. Spence
Deputy

(Filed May 17, 1984)

IN THE MUNICIPAL COURT OF
SOUTH JUDICIAL DISTRICT
COUNTY OF ORANGE
STATE OF CALIFORNIA

RETURN TO SEARCH WARRANT

The following property was taken from the premises located at 1575 Fayette Place, Laguna Beach, County of Orange, California. Further described as a two-story tan stucco/wood structure with a separate tan stucco/wood structure guest house. The guest house is located on the northside of the two story structure. The numbers 1575, black in color, are affixed to the attached garage door. The residence to be searched is situated on the westside of Fayette Place and is the first structure south of the intersection of Panorama Drive and Fayette Place.

By virtue of a Search Warrant, dated May 9, 1984, and executed by the Honorable Pamela ILES, Judge of the —Municipal Court of South Judicial District—for the County of Orange:

white plastic baggie containing approximately 1 pound of marijuana

3 brown tinted glass vials with residue

4 plastic straws with white powder residue

1 wooden tray, 12 x 4

plastic baggie with 5.0 grams of marijuana

package of zig-zag rolling papers

miscellaneous paperwork in name of GREENWOOD

brown corduroy jacket "Newman" with $310.00 U.S. currency

wooden box with 2.5 grams of hashish

$1,500.00 in U.S. currency

prefolded paper bindle containing approximately 10 grams of white powder (believed to be baking soda)

I, Inv. Robert RAHAEUSER, by whom this Warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me under the Warrant.

All of the property taken by virtue of said Warrant will be retained in my custody subject to the order of this Court or of any other Court in which the offense(s) in respect to which the property or things taken is triable.

/s/ Robert Rahaeuser

Suscribed and sworn to before me
this 17 day of May, 1984.

/s/ Pamela Iles
Judge of the Municipal Court

CECIL HICKS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA

MICHAEL R. CAPIZZI,
ASSISTANT DISTRICT ATTORNEY

WILLIAM W. BEDSWORTH, DEPUTY-IN-CHARGE
WRITS AND APPEALS SECTION

BY: MICHAEL J. PEAR,
DEPUTY DISTRICT ATTORNEY

POST OFFICE BOX 808
SANTA ANA, CALIFORNIA 92702
TELEPHONE: (714) 834-3600
Attorneys for Plaintiff

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. BILLY GREENWOOD, DYANNE VAN HOUTEN, Defendant.	CASE NO. C-55040 Points and Authorities In Opposition To Motion To Set Aside Information (Filed January 22, 1985)

STATEMENT OF THE CASE

Defendants Greenwood and Van Houten are charged in a five-count information with violations of Health and Safety Code sections prohibiting possession of controlled substances for use of possession for sale.

The charges arose from searches of Greenwood's Laguna Beach residence conducted on April 6, 1984 pursuant to a search warrant and on May 12, 1984 pursuant to a second search warrant.

Defendant Greenwood moves to set aside the information pursuant to Penal Code § 995 (a motion joined by Van Houten) claiming that the magistrate erred in denying defendants' motion to quash the search warrants and suppress all evidence seized thereunder.

Defendant claims that warrantless trash searches of Greenwood's garbage (set forth in the affidavits for each search warrant) was unlawful and that without that allegedly unlawfully seized information, the affidavits fail to provide probable cause for issuance of the warrants.

Defendant Greenwood also alleges that the warrants were invalid because probable cause to search both the main house and guest house had not been demonstrated.

Defendant Van Houten additionally argues that insufficient evidence was presented to establish her knowledge of the presence (or nature) of cocaine seized from her purse and that at most only possession for use (Count II) was established rather than possession for sale (Count I).

STATEMENT OF FACTS

The People adopt defendants statements as fair and accurate statements for the purpose of this motion with some additions:

Following receipt of information from both a DEA agent and from a neighbor of defendant, police main-

tained surveillance of the residence confirming traffic indicative of narcotic activity.

On April 6, 1984, at 6:00 a.m. Investigator Stracner observed a male adult open the garage door and put trash out to be picked up. The investigator contacted the trash collector and requested that the trash (clear of any other refuge) be turned over to the investigator.

The investigator took it to the police department where it was searched revealing incriminating evidence as set forth in the affidavit.

On May 4, 1984, with knowledge of the information Stracner had received, knowledge of the arrests and seizure of drugs which occurred April 6, 1984, plus citizen informant information between April 16, 1984 and May 3, 1984 of increased vehicular traffic, Investigator Rahauser requested the trash collector to retrieve refuse located in front of the house and bring it back to the officer.

Rahauser took it to the police department where he discovered evidence indicative of drug trafficking as set forth in the affidavit.

ISSUES PRESENTED

I. WERE THE WARRANTLESS TRASH SEARCHES UNLAWFUL?

II. WERE THE SEARCH WARRANTS ISSUED UPON SUFFICIENT PROBABLE CAUSE INDEPENDENT OF THE TRASH SEARCHES?

III. DOES SUBSTANTIAL EVIDENCE SUPPORT THE POSSESSION AND POSSESSION FOR SALE CHARGES AGAINST VAN HOUTEN?

ARGUMENT

I.

THE WARRANTLESS TRASH SEARCHES OF DEFENDANT GREENWOOD'S DISCARDED GARBAGE DID NOT VIOLATE THE FOURTH AMENDMENT RIGHTS OF EITHER DEFENDANT.

Initially it should be recognized that defendant Van Houten lacks standing to challenge the validity of the search of Greenwood's trash.

> California courts have consistently recognized and applied its "vicarious exclusionary rule" in prosecutions for crimes committed on or before June 8, 1982. (See, e.g., *People v. Chapman* (1984) (36 Cal.3d 98, 105, fn. 3; *People v. Gale* (1973) 9 Cal.3d 788, 793; *Kaplan v. Superior Court, supra,* 6 Cal.3d 150, 156-157.) On that date California voters passed an initiative measure which added, inter alia, section 28, subdivision (d), to article I of the California Constitution (hereafter section 28(d)). Section 28(d), popularly known as the "Truth-in-Evidence" provision, states, in part, that "relevant evidence shall not be excluded in any criminal proceeding. . . ."
>
> It is apparent that section 28(d) is in direct conflict with the state's judicially-created vicarious exclusionary rule. Given such a conflict, the superior authority of this constitutional provision, and it's clear, unambiguous language, we conclude that section 28(d) abolishes the "vicarious exclusionary rule" and prohibits courts from excluding relevant evidence. [*People v. Johnson* (1984) 85 Daily Journal DAR 56; *People v. Tellez* (1984) 161 Cal.App.3d 1067, 1069-1070; *People v. Daan* (1984) 161 Cal.App.3d 22, 25]
>
> . . . . A defendant can only challenge a violation of his own reasonable expectation of privacy. He cannot assert the illegality of the search of a third per-

> son makes inadmissible as to him the evidence seized in the course of the illegal search. (*United States v. Salvucci* (1980) 448 U.S. 83 [65 L.Ed.2d 619, 100 S.Ct. 2547]; *Rawlings v. Kentucky* (1980) 448 U.S. 98 [65 L.Ed.2d 633, 100 S.Ct. 2556]; *Rakas v. Illinois* (1978) 439 U.S. 128 [58 L.Ed.2d 387, 99 S.Ct. 421].) [*People v. Daan,* 161 Cal.App.3d at 27.]

Defendant Greenwood is correct in his view that *People v. Krivda, infra,* decided in 1971 prohibited the trash searches conducted in the case at bar.

The People contend, nonetheless, that the magistrat's ruling was correct. In light of Proposition 8 and federal authority, including U.S. Supreme Court decisions since *Krivda,* involving the scope of the Fourth Amendment in contexts other than trash searches, to the extent that *Krivda* purported to be based on federal grounds, it was erroneously decided and is not of continuing validity.

In *People v. Krivda* (1971) 5 Cal.3d 357, the California Supreme Court, in a 4 to 3 decision held that a warrantless trash search violated defendant's reasonable expectation of privacy.

The U.S. Supreme Court granted certiorari, but being unable to determine whether *Krivda* had been decided on federal grounds, state grounds or both, they vacated and remanded for clarification. (34 L.Ed.2d 45)

The California Court, which had in the earlier opinion made no mention of the California Constitution responded:

> Pursuant to the mandate hereinabove quoted we have reexamined our opinion in the subject case (reported at 5 Cal.3d 357 [96 Cal.Rptr. 62, 486 P.2d 1262]) and certify that we relied upon both the Fourth Amendment to the United States Constitution and

> article I, section 19, of the California Constitution, and that accordingly the latter provision furnished an independent ground to support the result we reached in that opinion. Inasmuch as we deem it unnecessary to alter or amend our prior decision, we reiterate that decision in its entirety.
>
> Let the remittitur issue forthwith.
>
> [*People v. Krivda* (1973) 8 Cal.3d 623, 624]

The enactment of Article I § 28(d) (Proposition 8—Truth in Evidence) abolished, in California, independent state grounds as a basis for excluding relevant evidence. [*People v. Johnson, supra; People v. Tellez, supra; People v. Daan, supra; People v. Chavers* (1983) 33 Cal.3d 462, 467; *People v. Ramirez* (1984) 162 Cal.App.3d 70; *People v. Helmquist* (1984) 161 Cal.App.3d 609; *People v. Anderson* (1983) 149 Cal.App.3d 1161, 1164-1165]

Decisions by California Appellate Courts and by the United States Supreme Court since *Krivda* was decided over 13 years ago demonstrate that California often elected to afford suspects a broader security against unreasonable searches than that required by the United States Supreme Court or by the Fourth Amendment. [e.g. *People v. Chapman* (1984) 36 Cal.3d 98, 106; *People v. Brisdendine* (1975) 13 Cal.3d 528, 549] Further, California court's post *Krivda* guesses at what federal law requires have been demonstrated to be wrong. [Compare *Burkholder v. Superior Court* (1979) 96 Cal.App.3d 421, holding that a search of posted, fenced property violated the Fourth Amendment, saying:

> The absolute limitation placed upon Fourth Amendment protection under the "open fields" doctrine of

> another era (see *Hester v. United States* (1924) 265 U.S. 57 [68 L.Ed. 898, 44 S.Ct. 445]) is no longer viable. (at 426)

with *Oliver v. United States* (1984) 80 L.Ed.2d 214 which held that officers driving past a locked gate, entering posted "No Trespassing" signs to discover defendant's marijuana violated neither the Fourth Amendment, *Katz* nor the still viable open fields doctrine of *Hester*.

> Steps taken to protect privacy, such as planting the marihuana on secluded land and erecting fences and "No Trespassing" signs around the property, do not establish that expectations of privacy in an open field are *legitimate* in the sense required by the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity, but whether the government's intrusion infringes upon the personal and societal values protected by the Amendment. The fact that the government's intrusion upon an open field is a trespass at common law does not make it a "search" in the constitutional sense. In the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment. (80 L. Ed.2d at 220)

Every federal circuit court of appeals considering the issue has concluded that warrantless trash searches do not violate the Fourth Amendment. [*United States v. Mustone* (1st Cir.) (1972) 469 F.2d 970; *United States v. Terry* (2nd Cir.) (1983) 702 F.2d 299; *United States v. Reicherter* (3rd Cir.) (1981) 647 F.2d 397; *United States v. Crowell* (4th Cir.) (1978) 586 F.2d 1020; *United States v. Vahalik* (5th Cir.) (1979) 606 F.2d 99; *Magda v. Benson* (6th Cir.) (1976) 536 F.2d 111; *United States*

v. Shelby (7th Cir.) (1978) 573 F.2d 971; *United States v. Biondich* (8th Cir.) (1981) 652 F.2d 743]

In *United States v. Dzialak* (1971) 441 F.2d 212, the 2nd Circuit said in rejecting the idea (embraced by *Krivda*) that municipal trash ordinances negate abandonment.

> We are not persuaded. We think it abundantly clear that Dzialak abandoned the property. The town ordinance simply cannot change the fact that he "threw [these articles] away" and thus there "can be nothing unlawful in the Government's appropriation of such abandoned property." *Abel v. United States*, 362 U.S. 217, 241, 80 S.Ct. 683, 698, 4 L.Ed.2d 668 (1960).
>
> Appellant alleges further that the search warrants obtained December 4, 1967 were improperly issued. The first contention is that their issuance was based primarily on the fruits of what has been contended to be an illegal search and seizure by Poling. Since we have already held that the searches by Poling were legal, we need not concern ourselves with this part of the argument. It is contended further, however, that the warrants, which were issued on the basis of Gray's affidavit rather than Poling's, were issued without probable cause. (441 F.2d 212, 215 cert. den. 30 L.Ed.2d 165)

In *United States v. Reicheter, supra,*

> Defendant claims that under *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), he had a reasonable expectation of privacy in the trash he placed in a public area to be picked up by trash collectors such that, when the police officers looked through the garbage and seized the methamphetamine, they violated the fourth amendment. A mere recitation of the contention carries with it its own refutation.

Every circuit considering the issue has concluded that no reasonable expectation of privacy exists once trash has been placed in a public area for collection. The reasoning underlying these decisions is clear and persuasive. As stated by the Seventh Circuit in *Shelby*:

> [T]he placing of trash in garbage cans at a time and place for anticipated collection by public employees for hauling to a public dump signifies abandonment.

Id. 573 F.2d at 973. Having placed the trash in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it, it is inconceivable that the defendant intended to retain a privacy interest in the discarded objects. If he had such an expectation, it was not reasonable. Accordingly, the district court properly denied his motion to suppress. (647 F.2d at 399)

In *U.S. v. Crowell, supra,* the court recognized *Krivda,* but said:

> . . . we think that the better view is that expressed by every United States Court of Appeals that has had reason to address the issue.
>
> . . . .
>
> In accord with those cases, our view is that, absent proof that a person has made some special arrangement for the disposition of his garbage inviolate, he has no reasonable expectation of privacy with respect to it once he has placed it for collection. The act of placing it for collection is an act of abandonment and what happens to it thereafter is not within the protection of the fourth amendment. (586 F. 2d at 1025 cert. den. 59 L.Ed.2d 772)

Vahalik, supra, also rejected *Krivda* or the argument that trash ordinances negate abandonment.

> We prefer the view adopted by every United States Court of Appeals to consider the issue, that the act of placing garbage for collection is an act of abandonment which terminates any fourth amendment protection because, "absent proof that a person has made some special arrangement for the disposition of his garbage inviolate, he has no reasonable expectation of privacy with respect to it once he has placed it for collection."
>
> . . . .
>
> The municipal ordinance cited by appellate does not alter the application of this rule in the instant case because there is no indication in the record that appellant relied upon the ordinance to increase his expectation of privacy, or that he was even aware of the ordinance. The purpose of the ordinance was, presumably, sanitation and cleanliness, not privacy. (606 F.2d at 101 cert.den. 62 L.Ed.2d 765)

In *Magda v. Benson, supra,*

> Magda contends that the warrantless search of his garbage by postal inspectors violated his reasonable expectation of privacy and that evidence so obtained cannot be the basis of a valid search warrant under the Fourth Amendment. District Judge Leroy J. Contie rejected Magda's contention. His decision is supported by federal case law, which holds that garbage under such circumstances is abandoned and no longer protected by the Fourth Amendment. 536 F.2d at 112.

In *U.S. v. Shelley, supra,* the court held:

> As we see the issue, it is whether or not the search of the trash constituted a violation of the defendant's reasonable expectation of privacy. *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). It is defendant's position that he had a reasonable expectation of privacy in his trash since he

> contemplated that it would be collected and disposed of by intermingling with other trash and eventually destroyed. Perhaps the defendant did in fact believe that the incriminating evidence of his crime so disposed of would go undetected. If defendant did, we view it only as additional bad judgment on his part. In the real world to so view the status of one's discarded trash is totally unrealistic, unreasonable, and in complete disregard of the mechanics of its disposal.
>
> . . . .
>
> It therefore seems to be more prudent to put only genuine trash, not secrets, in garbage cans, except perhaps in California.

The Court found *Krivda* "is too unrealistic to be pursued." (573 F.2d at 974 cert.den. 58 L.Ed.2d 139)

The Court, relied in part on *Lewis v. U.S.*, 17 L.Ed.2d 312, in finding no Fourth Amendment violation by police instructing trash collector to act for them. (573 F.2d at 974, fn.7)

In *U.S. v. Biondich, supra,*

> The two inspections of Biondich's garbage occurred in the same manner: A police officer from the Minneapolis police department approached an employee of the private garbage-hauling service that regularly collected trash from Biondich's house and made arrangements to meet the collector in a parking lot about one block from Biondich's house in the usual manner, except that he dumped the cans to one side of the collection bin to keep it separate from the garbage from other houses. He did not compact the trash into the truck and he proceeded to the meeting place where the officer looked through the bin and collected the items in question. (652 F.2d at 744-745)

The court held:

> When a person makes arrangements with a sanitation service to have the items picked up, however, and when the items are placed in the designated place for collection and the regular collector makes the pickup in the usual manner on the scheduled collection day, the person loses his or her legitimate expectation of privacy in the items at the time they are taken off his or her premises. (at 745)

In *Abel v. United States* (1960) 4 L.Ed. 668 the court upheld a search of a hotel room wastepaper basket immediately after defendant had paid his bill and vacated the room.

> Nor was it unlawful to seize the entire contents of the wastepaper basket, even though some of its contents had no connection with crime. So far record shows, petitioner had abandoned these articles. He had thrown them away. So far as he was concerned, they were bona vacantia. There can be nothing unlawful in the Government's appropriation of such abandoned property. (4 L.Ed.2d at 687)

Krivda requires reexamination! It was not, and is not, federal law.

Additionally, the People contend that the magistrate's ruling was corect because there was probable cause to search the trash thus distinguishing the facts from *Krivda*. (See, *People v. Parker* (1974) 44 Cal.App.3d 222, 229; *People v. Stewart* (1973) 34 Cal.App.3d 695, 700; *People v. Cohen* (1976) 59 Cal.App.3d 241, 245)

II.

SUFFICIENT PROBABLE CAUSE EXISTED EVEN WHERE THE EVIDENCE SECURED FROM THE TRASH SEARCHES IS EXCISED FROM THE AFFIDAVIT.

It has been recognized that the court may view the affidavit excising information unlawfully seized. (e.g. *Parker, supra* at 229)

The standard for determining probable cause, past Proposition 8 is found in *Gates v. Illinois* (1983) 76 L.Ed. 2d 527, applicable in California. [*People v. Ramirez* (1984) 162 Cal.App.3d 70]

In *Gates, supra,* the police received an anonymous letter reporting that Mr. and Mrs. Gates were involved in drug trafficking describing an imminent Florida trip. The police corroborated details of the tip independently. The corroboration showed that the Gates made the trip and drove a car. A search warrant of the residence and automobile issued. The trial court and Illinois Supreme Court ruled that probable cause was not established and ordered the evidence suppressed.

The United States Supreme Court reversed:

> . . . "the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation. . . . It imports a seizure made under circumstances which warrant suspicion." More recently, we said that "the quanta . . . of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, nu-

> merically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." (76 L.Ed.2d at 546)

The Court abandoned the so-called "two-pronged test of *Aguilar* and *Spinelli* and adopted a totality of circumstances analysis.

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. (76 L.Ed.2d at 548)

The court further found that:

> The corroboration of the letter's predictions that the Gates' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he would drive the car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true. "Because an informant is right about some things, he is more probably right about other facts,"
>
> . . . .
>
> It is enough, for purposes of assessing probable cause. that "corroboration through other sources of information reduced the chances of a reckless or prevaricating tale," thus providing "a substantial basis for crediting the hearsay." (at 552)

Following *Gates,* the United States Supreme Court considered the issue of probable cause in *Massachusetts v. Upton* (1984) 80 L.Ed.2d 721.

There, an informant advised police of "a motorhome full of stolen stuff" at a specific location. The informant said she was defendant's girlfriend, saw the property and related facts showing knowledge about an earlier search of a motel room involving stolen property.

The Massachusetts Supreme Court said no probable cause. The U.S. Supreme Court reversed.

> Following the phone call, Lt. Beland went to Upton's house to verify that a motor home was parked on the property. (80 L.Ed.2d at 725)

The Court said:

> The facts that tended to corroborate the informant's story were that the motor home was where it was supposed to be, that the caller knew of the motel raid which took place only three hours earlier, and that the caller knew the name of Upton and his girlfriend. But, much as the Supreme Court of Illinois did in the opinion we reviewed in *Gates, supra,* the Massachusetts court reasoned that each item of corroborative evidence either related to innocent, nonsuspicious conduct or related to a event that took place in public. (at 726)

The Court found that:

> . . . the pieces fit neatly together and, so viewed support the magistrate's determination that there was "a fiar probability that contraband or evidence of crime" would be found in Upton's motor home.

In the case at bar, the affidavit of April 6, 1984 relates information from DEA Agent McMillan describing

information from an arrestee of a U-Haul truck bringing a controlled substance to a specific address. Independent of that, the affiant received information from a citizen informant neighbor suggesting late traffic in and out of the residence, and reporting a U-Haul parked in front of it. The affiant surveilled the residence and observed vehicle traffic indicative of narcotic activity. The affiant followed one vehicle to another location previously under investigation for drug trafficking.

> . . . the police observed a large number of persons visiting defendant's residence. In three days of surveillance, 22 visits took place. Most of the visitors came in the evening and stayed only a short time. Their arrivals and departures were staggered so that there was rarely more than one visitor at the home at any one time. Frequent brief visits to a residence by numerous persons is an indication of narcotic traffic.
>
> . . . .
>
> The officer making the affidavit in this case related his extensive experience in the field of narcotics investigations. He stated that in his opinion the frequent comings and goings from the defendant's residence and his narcotics arrest record, among other things, indicated narcotics were being dealt from that residence.
>
> "It is fundamental that an officer's observations can give rise to probable cause [for a search] . . . if that officer had sufficient training and experience from which to draw the conclusions necessary to create a reasonable belief in the presence of contraband." Therefore, this officer's opinion was another factor the magistrate could legitimately consider in determining probable cause for the search. [*People v. Kershaw* (1983) 147 Cal.App.3d 750, 759 and 760]

The affidavit in support of the second warrant (May 9, 1984) incorporated all the information of the prior affidavit as well as evidence seized during the first search and additional information from the citizen informant of traffic in and out of the address.

> A suspect's narcotics arrest record is relevant to the magistrate's determination of probable cause. The combination of a defendant's narcotics arrests and suspicious traffic to and from his residence was held to support probable cause for a search. . . . [*Kershaw, supra,* 147 Cal.App.3d at 760]

The scope of the warrants directing searches of the home at 1575 Fayette with a tan guest house is valid.

Cases dealing with multiple family apartments are distinguishable. A guest house like a guest room is part of the owner's residence. Or, the warrant could be viewed as authorizing a search only of the house which is described as a particular residence that has a guest house. In the latter case, however, search of the guest house which uncovered only a scale was improper.

In *United States v. Leon* (1984) 468 U.S. —, 82 L.Ed.2d 677, 104 S.Ct. —, it was held that the exclusionary rule was modified so as not to bar evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but later found unsupported by probable cause.

In *Massachusetts v. Sheppard* (1984) 82 L.Ed.2d 737, the court upheld a search where a preprinted warrant for drugs was issued in a homicide investigation when the magistrate failed to make clerical changes.

> This case involves the application of the rules articulated today in *United States v. Leon,* — U.S. —, 72 L.Ed.2d 677, 104 S.Ct. —, to a situation in which police officers seize items pursuant to a warrant subsequently invalidated because of a technical error on the part of the issuing judge. (82 L.Ed.2d at 741.)

The court concluded:

> In sum, the police conduct in this case clearly was objectively reasonable and largely error-free. An error of constitutional dimensions may have been committed with respect to the issuance of the warrant, but it was the judge, not the police officers, who made the critical mistake. "[T]he exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges." (at 745.)

Similarly, in *People v. Macavoy* (1984), 84 Daily Journal D.A.R. 4150, the court upheld the search. While concluding that the warrant on its face was generally void because it constitutionally failed to describe particularly the place to be searched, one room of a fraternity house, rather than the entire house, the court held that *Leon* and *Sheppard* apply.

> In *Sheppard,* the officer sought a warrant authorizing a search for evidence of a murder. Instead, he received a warrant authorizing a search for controlled substances. We believe that this patent error would have been obvious to a layman, and even more obvious to a police officer who had at least some familiarity with the Fourth Amendment's particularity requirement. The defect in the present case, however is far less obvious than that in *Sheppard* and requires a deeper knowledge of Fourth Amendment law to detect. We therefore believe it was reasonable, even in the absence of additional verbal assurances, for Officer White and his fellow officers to believe that the war-

rant they received authorized the search the [sic] conducted.

Because Officer White and the other officers involved in the search had an objectively reasonable good faith belief that the warrant authorized the search they conducted, we are compelled to conclude that the evidence produced by that search should not be suppressed. (*Macavoy*, at 4152; see also *People v. Helmquist* (1984) 161 Cal.App.3d 609 holding that *Leon* applies in California post Proposition 8; see also *People v. Daan* (1984) 161 Cal.App.3d 22; *People v. Tellez* (1984) 84 Daily Journal D.A.R. 3900.)

IV.

THE CHARGES AGAINST VAN HOUTEN ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Defendant's argument regarding possession for sale versus possession erroneously concludes that the magistrate's finding was a finding of fact. It wasn't. It was a legal conclusion based in part on opinions based on facts. If the magistrate found that the amount wasn't as shown or wasn't in the form described, that is a finding of fact.

People v. Slaughter (1984) 35 Cal.3d 629, 639 on which defendant purports to rely, explains the distinction by discussing prior cases:

> In *People v. Beagle* (1972) 6 Cal.3d 441 [99 Cal. Rptr. 313, 492 P.2d 1], the magistrate dismissed a count charging defendant with setting a fire at Lewin's Furniture Store, stating that the evidence was "too weak" because it failed to show motive. (P. 457.) The prosecutor filed an information which included the dismissed count, and defendant was convicted on the charge. On appeal, we stated that "[i]f the magistrate had found *as a matter of fact* that de-

fendant had not started the Lewin's fire, the district attorney might well have been bound by his determination. [Citing *Jones v. Superior Court, supra,* 4 Cal. 3d 600.] The district attorney, however, need not accept the magistrate's legal conclusion." (Pp. 457-458.) Since the magistrate made no express findings, we did not inquire whether substantial evidence might support a finding, but instead held that "the magistate's ruling as to the Lewin's count was patently *erroneous as a matter of law . . . .*" (P. 458, italics added.)

In *Pizano v. Superior Court* (1978) 21 Cal.3d 128 [145 Cal.Rptr. 524, 577 P.2d 659], the victim of a robbery was killed when Pizano's codefendant used the victim as a shield from gunfire. The magistrate dismissed the murder charge against defendant on the ground that the prosecution failed to prove malice. Our opinion noted that "an offense not named in the commitment order may not be added to the information if the magistrate made *factual findings* which are fatal to the asserted conclusion that the offense was committed . . . . When, however, the magistrate either expressly or impliedly accepts the evidence and simply reaches the ultimate *legal conclusion* that it does not provide probable cause . . . . such conclusion is open to challenge by adding the offense to the information." (P. 133.) *We then held that the magistrate's determination "was a legal conclusion, not a finding of fact as that term is used in Jones.* Therefore, the People were entitled to challenge his action by recharging the murder count." (Pp. 133-134.)

The burden on the prosecution at the preliminary hearing is to produce evidence of a reasonable probability (i.e. enough to induce a strong suspicion in the mind of a man of ordinary caution of prudence) that a crime has been committed and that the defendant is the guilty person. *People v. Davidson* (1964) 227 Cal.App.2d 331, 334.

On review of a preliminary hearing, however, the order of the magistrate holding the defendant to answer is to be upheld if the evidence supplies "some rational ground" for assuming that the defendant has committed an offense. *Williams v. Superior Court* (1969) 71 Cal.2d 1144; *People v. Harris* (1975) 52 Cal.App.3d 419. Every legitimate inference that may be drawn from the evidence must be drawn in favor of the prosecution. *Rideout v. Superior Court* (1967) 67 Cal.2d 471.

It was not unreasonable to assume the possibility that Van Houten knowingly possessed that which was in her purse. That other inferences are possible does not defeat probable cause.

Wherefore defendants' motions should be denied.

DATED this 21st day of January, 1985.

Respectfully submitted,

CECIL HICKS,
DISRICT ATTORNEY
COUNTY OR ORANGE
STATE OF CALIFORNIA
MICHAEL R. CAPIZZI
ASSISTANT DISTRICT ATTORNEY
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DEPUTY-IN-CHARGE
WRITS AND APPEALS SECTION

BY: /s/ Michael J. Pear
DEPUTY DISTRICT ATTORNEY

Receipt of the above is
hereby acknowledged by:

/s/ Joseph S. Demo
Public Defender's Office

Date Received: January 22, 1984

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF ORANGE

Portion of Reporters Transcript of 1-25-85 and 2-1-85 on Motion to Set Aside Information.

(By Mr. Pear for the People)

But I would indicate to the Court, the People's position is that the magistrate was right on concluding that in view of what has happened in Federal Court decisions since Krivda and in view of United States Supreme Court decisions in other Fourth Amendment areas besides trash searches and in view of the enactment of Prop . . . 8, Krivda which was an incorrect statement of federal law at the time it was made, is certainly an incorrect statement of either California or federal law currently and should be reversed. And it may well be, as Mr. Garey's indicated, that it is the California Supreme Court or the United States Supreme Court that have the power to do so. (RT 9:4-15)

MR. GAREY: If the United States Supreme Court takes up trash can search issues and rules consistent with the Federal Circuit Court cases that changes the complexion of where we're at right now completely. Unfortunately for the People, that hasn't happened.

There are only two courts in this country that can help the People out, and where we are right now isn't one of them. If they want to hold out and taken an appeal to D.C.A. and see if they can get a hearing granted in front of California Supreme Court, maybe they'll have luck.

We have put almost all of our argument on the Fourth Amendment, frankly, because of Proposition 8. We don't

have to really get into the merits of the validity of Proposition 8 so long as the rulings in Krivda as to the Fourth Amendment stands or at least until the California Supreme Court or the U.S. Supreme Court says otherwise. (RT 15:25-16:13)

* * *

Krivda says the law is that the Fourth Amendment prohibits the kind of trash can pick up involved in this case.

There are only, as I indicated, two courts powerful enough to overturn that ruling. One is United States Supreme Court which hasn't taken up the issue. The other is the California Supreme Court which hasn't taken up the issue. They may take up the issue in the case of Greenwood and Van Houten, however. (RT 22:25-23:8)

(By The Court)

It's difficult when you find a case on the federal level that is much more well-reasoned than the California Supreme Court case involving People versus Krivda. And it's difficult for a trial court when you look at the rationality, in my opinion, of the Krivda decision. (26:21-25)

I think your argument's correct. I think I'm bound distastefully to grant your 995 which I'm doing at this time. Also I'm hopeful and would encourage the prosecution to appeal this.

There is a horrendous situation in terms of trash in this Court's opinion. Looking at Page 368 of Krivda, it's, apparently, an invasion of privacy if we rummage through a trash can; but once that trash can is put near other trash, we can rummage through it. I have difficult time following that rationale. (RT 27:20-28:3)